

November 24, 2003

The Honorable Yukio Kitagawa
Chairperson, Board of Agriculture
1428 S. King Street
Honolulu, Hawaii 96814-2512

Attention: Larry M. Nakahara, Manager
Plant Quarantine Branch

Dear Mr. Kitagawa:

Re: Records Concerning the Importation of Green
Coffee Beans

This is in response to your memorandum dated February 23, 1994 to Attorney General Robert A. Marks requesting an opinion concerning the public's right to inspect and copy the above-referenced government records. In accordance with established protocol, your letter was forwarded to the Office of Information Practices ("OIP") for the issuance of an advisory opinion.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), import permits, inspection reports, shipping manifests, and invoices maintained by the Department of Agriculture concerning the importation of green coffee beans into the State must be made available for public inspection and copying upon request.

BRIEF ANSWER

Yes. However, information in the import permits, inspection reports, shipping manifests, and invoices that reveals the price or quantity of the imported green coffee beans constitutes "confidential commercial and financial information" because the disclosure of this information would likely result in substantial

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harm to the competitive position of the importer. Consequently, all information in the aforementioned records that reveals quantity or price is protected by the UIPA's "frustration of a legitimate government function" exception and must be segregated from the requested records before they are disclosed.

FACTS

The State Department of Agriculture, Plant Quarantine Branch, regulates the quarantine of plant and non-domestic animals imported into the State. Records maintained by the Department regarding the importation of green coffee beans include import permits, inspection reports, shipping manifests, and invoices. Importers of green coffee beans must file an "Import Permit" ("Permit") with the Plant Quarantine Branch. A blank copy of the Permit is attached as Exhibit "A." The Permit authorizes the importation of a certain quantity of a commodity, in this case, green coffee beans, within a certain time period. Other information contained on the Permit includes the date of the permit, the permit number, conditions of importation, the name and address of the shipper, and the name, address, and telephone number of the importer. The form also contains signature lines for the Chief Plant Inspector, and the Chairperson of the Board of Agriculture.

The Permit may also contain remarks indicating the date and time when the coffee bean shipment was inspected and whether the shipment requires fumigation. Some of the Permits also contain notes concerning the date and time the shipment was fumigated, the type and amount of fumigant used, the name of the fumigator, and the date and time the fumigant was exhausted from the shipment.

The Plant Quarantine Branch requires all imported green coffee beans to be treated to prevent the spread of coffee rust disease. Importers may either fumigate the beans before shipping, in which case there must be a certification of treatment attached to the shipment, or importers may arrange for a pesticide applicator to fumigate the beans at the port of entry in Hawaii. Untreated beans are quarantined until treated by a pesticide applicator. The Plant Quarantine Branch's Inspection Report, a blank copy of which is attached as Exhibit "B," contains the following information:

1. Port
2. Arrival date
3. Ship
4. Origination of ship
5. Shipment number
6. Baggage Claim Check number
7. Inspection date/time
8. Name of inspector
9. Permit number and date
10. Commodity and amount
11. Remarks
12. Consignor's name and address
13. Consignee's name and address
14. Pest found
15. Treatment
16. Charges (dollar amount)
17. Disposition (Passed, Treated, Pending, Returned to Shipper, or Destroyed)
18. Date delivered
19. Time
20. Person who delivered
21. Signature of importer or agent
22. Remarks/Additional Commodity

The Plant Quarantine Branch also requires all imported shipments of green coffee beans to be accompanied by an invoice or shipping manifest listing the amount and type of coffee beans being shipped. The sample invoices that were provided for the OIP's review contained the following types of information:

1. Name, address, and telephone number of the consignor
2. Name and address of the purchaser
3. Invoice number
4. Invoice date
5. Ship
6. Ship date
7. Due date
8. Terms of shipping
9. Customer Identification Number
10. Purchase Order date
11. Seller's order number
12. Name of salesman
13. Product identification

14. Description of product
15. Amount ordered
16. Amount shipped
17. Unit/Measure (of shipment)
18. Unit price
19. Amount
20. Tax
21. Total

The Plant Quarantine Branch also maintains copies of shipping manifests relating to imported green coffee beans. Samples of these shipping manifests provided for the OIP's review contained the following types of information:

1. Name and address of consignor
2. Name and address of consignee
3. Destination
4. Route
5. Delivering Carrier
6. Car number
7. Number of packages
8. Description of articles
9. Weight of each unit
10. Freight charges
11. Total weight
12. Total freight charges

In a request to Larry Nakahara, Manager of the Department of Agriculture's Plant Quarantine Branch, dated February 8, 1994, Jeff Citron, Legislative Chairman of the Kona Coffee Council, requested copies of "permits issued to all companies that brought shipments of green coffee" to the Big Island. He also requested copies of all the invoices, shipping manifests, packing slips or orders slips that were shipped with the coffee beans.

DISCUSSION

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1992). Further, section 92F-11(b), Hawaii Revised Statutes, provides that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours."

Of the five exceptions to required agency disclosure in section 92F-13, Hawaii Revised Statutes, only one exception possibly applies to the records at issue here. Section 92F-13(3), Hawaii Revised Statutes, states that the UIPA does not require the disclosure of "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." One example provided by the Legislature of information protected by this "frustration" exception is "trade secrets or confidential commercial and financial information." See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

The federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), contains a similar exemption for "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. §552(b)(4) (1988).¹ Determining whether commercial or financial information in a requested record is "confidential" has been the critical issue in most Exemption 4 litigation. The applicable standard for determining whether such information is "confidential" is set forth in a two-part test created by the Court of Appeals for the District of Columbia Circuit in National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974):

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks at 770. The OIP has applied this two-part test in previous opinion letters to determine whether commercial and financial information is "confidential." See OIP Op. Ltr. No.

¹In several previous OIP opinion letters, we found guidance in case law applying Exemption 4 of FOIA when determining whether information constitutes "confidential Commercial and financial information." See OIP Op. Ltr. No. 92-17 (Sept. 2, 1992); OIP Op. Ltr. No. 93-1 (April 8, 1993).

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92-17 (Sept. 2, 1992); OIP Op. Ltr. No. 91-29 (Dec. 23, 1991); and OIP Op. Ltr. No. 90-21 (June 20, 1991).

We do not believe that the first prong of the two-part National Parks test applies to the facts presented. Disclosure of the records is not likely to impair the government's ability to obtain necessary information in the future because the importer is required to submit the records in order to import the coffee beans into the State. See OIP Op. Ltr. No. 91-16 at 11 (Sept. 19, 1991) and cases cited therein. However, we must determine whether the second prong of the National Parks test would apply to protect certain information contained in the records requested.

The records provided for the OIP's review include information such as quantity and price of the beans shipped. We believe that this information, if disclosed, could result in substantial harm to the competitive position of the importer. Under federal case law, price and quantity information has been found to be protected under the second prong of the National Parks test. In Timken Company v. United States Customs Service, 491 F. Supp. 557 (D.D.C. 1980), the District Court of Columbia held that the disclosure of the price and quantity of roller bearings imported from Japan would cause competitive injury to both importer and exporter because the information would enable competitors and customers to estimate profit margins and production costs, and thereby give competitors insight into the company's competitive strengths and weaknesses. Thus, the court found that the price and quantity data was protected from disclosure by Exemption 4 of the federal FOIA. See also Braintree Electric Light Department v. Department of Energy, 494 F. Supp. 287, 289 (D.D.C. 1980) (selling prices, inventory balances, thruput charges, profit margins, purchase activity, freight charges, and cost of goods sold are protected under Exemption 4).

Consequently, we are of the opinion that any information revealing the quantity or price of the green coffee beans imported into the State should be segregated from the import permits, the inspection reports, the shipping manifests, and the invoices before they are disclosed to the public. However, the remaining information in the records would not constitute "confidential commercial and financial information" and, therefore, should be made available for public inspection and

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copying upon request.

As a final note, we observe that section 92F-12(a)(13), Hawaii Revised Statutes, which specifically makes public "[r]osters of persons holding licenses or permits granted by an agency that may include name, business address, type of license held, and status of the license," does not apply to the present situation. The records requested concern the importation of green coffee beans, not a roster of the Import Permit holders.

CONCLUSION

The UIPA's "frustration of a legitimate government function" exception, which protects "confidential commercial and financial information," applies to the quantity and price information in the import permits, the inspection reports, the shipping manifests, and the invoices concerning the importation of green coffee beans into the State. This information must be segregated from the records before they are made publicly available under the UIPA.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML:sc
Attachments
c: Jeff Citron
Kona Coffee Council